

CHARLES A. MICHALEK, ESQ.

Nevada Bar No. 5721

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

700 South Third Street

Las Vegas, Nevada 89101

Phone: (702) 383-3400

Email: [cmichalek@rmcmlaw.com](mailto:cmichalek@rmcmlaw.com)

Lawrence S. Gosewisch (admitted *pro hac vice*)

Brian T. Maye (admitted *pro hac vice*)

Matthew D. Martin (admitted *pro hac vice*)

ADLER MURPHY & McQUILLEN LLP

20 South Clark Street, Suite 2500

Chicago, Illinois 60603

Phone: (312) 345-0700

Email: [lgosewisch@amm-law.com](mailto:lgosewisch@amm-law.com)

[bmaye@amm-law.com](mailto:bmaye@amm-law.com)

[mmartin@amm-law.com](mailto:mmartin@amm-law.com)

*Attorneys for Defendants Frontier Airlines, Inc.,  
Scott Warren, and Rex Shupe*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PETER DELVECCHIA, individually and as  
next friend of A.D., a Minor,

*Plaintiffs,*

v.

FRONTIER AIRLINES, INC.,  
SCOTT WARREN, and REX SHUPE,

*Defendants.*

Case No.: 2:19-cv-01322-KJD-DJA

**FRONTIER'S RESPONSE TO  
PLAINTIFFS' SUR-REPLY TO  
FRONTIER'S MOTION FOR RULE 35  
MENTAL EXAMINATION**

**DEFENDANT FRONTIER AIRLINES, INC.'s  
RESPONSE TO PLAINTIFFS' SUR-REPLY  
TO FRONTIER'S MOTION FOR RULE 35 MENTAL EXAMINATION**

Defendant Frontier Airlines, Inc., ("Frontier"), hereby Responds to Plaintiffs' Sur-Reply to  
Frontier's Motion for Rule 35 Mental Examination.

## INTRODUCTION

Plaintiffs provide a perfect example of why sur-replies are “highly disfavored, as they usually are a strategic effort by the nonmovant to have the last word on a matter.” *Avery v. Barsky*, No. 3:12-cv-0652, 2013 WL 1663612, at \*2 (D. Nev. Apr. 17, 2013).

In Response to Frontier’s Rule 35 Motion, Plaintiffs challenged nearly every aspect of Frontier’s proposed protocol for A.D.’s exam and argued, alternatively, that a series of additional “safeguards” should be imposed if the Court allows Dr. Stephanie Holland to examine A.D. ECF 182, p. 5. Contrary to Plaintiffs’ allegations, Frontier did not raise any new arguments in its Reply brief in support of its Rule 35 Motion. Frontier simply responded to Plaintiffs’ arguments and alternative requests for additional “safeguards.” In addition, Frontier made significant concessions and proposed a revised protocol that eliminated several contested aspects of the exam. Frontier hoped that making these concessions would simplify the issues in dispute. However, proving that no good deed goes unpunished, Plaintiffs responded that Frontier might have “proposed the original protocol as a ‘stalking horse,’ always intending to propose the second version in their Reply, affording Plaintiffs no opportunity to respond.” ECF 184, p. 5.

Plaintiffs are wrong to again accuse Frontier of “misleading” the Court, they are wrong to accuse Frontier of bad faith in its concessions regarding the Rule 35 protocol, and they are wrong to argue that Frontier’s proposed revisions to the protocol include anything improper for examining a minor who claims to have suffered post-traumatic stress disorder (“PTSD”). Frontier respectfully requests that this Court grant Frontier’s Motion for a Rule 35 Mental Examination of A.D. in accordance with the revised protocol that Frontier proposed in its Reply brief. See ECF 183, p. 4.

### **I. Frontier has not Misled the Court**

Plaintiffs’ Sur-Reply begins with a wholly improper and erroneous characterization of events that have nothing to do with Frontier’s underlying Motion for a Rule 35 Mental Examination. Plaintiffs accuse

1 Frontier of making “numerous false and misleading assertions” and suggest that Frontier’s counsel cannot  
2 be trusted to facilitate an appropriate Rule 35 examination. ECF 186, pp. 2-3. Plaintiffs’ grievances trace  
3 back to the Court’s denial of their successive motions for sanctions based on (1) the timing of Frontier’s  
4 production of documents and (2) the redactions therein for sensitive passenger and employee information.  
5

6 In its Response to Plaintiffs’ first motion for sanctions, regarding the timing of its production,  
7 Frontier argued that Plaintiffs had entered multiple stipulations to extend discovery deadlines wherein  
8 they agreed that both parties were working diligently to complete discovery and Frontier required  
9 additional time to search for responsive documents. ECF 134, p. 5. Regarding the propriety of the  
10 redactions, Frontier asserted the following:  
11

12 Plaintiffs have not established that the identities of the passengers involved in unrelated  
13 incidents and involving unrelated crew members are relevant or proportional to the needs  
14 of the case; nor have they shown that the disclosure of the information would outweigh the  
15 privacy interests of Frontier’s passengers. Disclosure of this information is particularly  
16 concerning given the sensitive nature of the underlying documents and the fact that some  
of these passengers may be wholly unaware that these documents even exist. Therefore,  
Frontier was justified in redacting the passenger’s identifying information and requests the  
Court allow those redactions to stay in place. *Id.* at p. 12.

17 Plaintiffs claim the statements above misled the Court into erroneously denying their motions for  
18 case-ending sanctions. ECF 186, pp. 2-3. Plaintiffs made the same argument in support of their Fourth  
19 Motion to Compel (ECF 169, p. 2), and again in their recent Motion for Leave to File Sur-Reply (ECF  
20 184, p. 2). Frontier will not burden the Court with a line-by-line analysis addressing Plaintiffs’ many false  
21 accusations of wrongdoing. The pleadings and exhibits in the record speak for themselves, and Frontier  
22 has confidence the Court is capable of drawing its own conclusions.  
23

24 Of course, Plaintiffs also maintain Frontier should have been sanctioned for arguing its redactions  
25 are supported by *Anders v. United Airlines, Inc.*, No. CV 19-5809-GW (KS), 2020 U.S. Dist. LEXIS  
26 250250, at \*9-10 (C.D. Cal. 2020). According to Plaintiffs, in relying on *Anders* and its treatment of 14  
27  
28

1 C.F.R. § 243.9, Frontier “falsely represented to the Court that a rule of federal law exists in the context of  
2 airline lawsuits requiring it to redact passenger-identifying information from documents.” ECF 186, p. 2.

3 Again, Frontier will not waste the Court’s time arguing the propriety of the *Anders* ruling or  
4 summarizing its reasons for redacting the disputed passenger contact information. Frontier submits only  
5 that claiming a court has been misled is a serious allegation, and one which Plaintiffs make far too lightly  
6 and far too frequently. The problem with Plaintiffs’ case is not misleading defense arguments or improper  
7 judicial rulings. The problem is that Plaintiffs have set out to prove a discrete episode of intentional  
8 discrimination against bi-racial family members based on hundreds of unrelated complaints that have  
9 nothing to do with this case.  
10

11 In sum, whether the Court ruled properly on the propriety of Frontier’s redactions has nothing to  
12 do with Frontier’s instant Rule 35 Motion, and Plaintiffs have used their Sur-Reply as a vehicle to again  
13 express their discontent over their inability to contact Frontier’s former passengers who know absolutely  
14 nothing about the facts alleged in this case. The Court should disregard the arguments discussed above in  
15 their entirety and consider using its inherent sanction authority to discourage Plaintiffs from continuing to  
16 claim Frontier has misled the Court. See *Hernandez v. Franco American Baking Co.*, No. 3:20-cv-00628-  
17 LRH-WGC, 2021 U.S. Dist. LEXIS 244149, at \*5 (D. Nev. Sep. 3, 2021).  
18

## 19 **II. Frontier has not Mischaracterized Deposition Testimony**

20 Frontier noted in its Reply in Support of its Motion for a Rule 35 Mental Examination of A.D.:

21 “Plaintiffs have disclosed through their deposition testimony and answers to written  
22 interrogatories that there have been other occasions when they were questioned under  
23 similar circumstances by authorities based on concerns of inappropriate physical contact.  
24 One instance involved a movie theatre, and another involved a different airline. Dr. Holland  
25 should be permitted to question A.D. about his prior experiences, including but not limited  
26 to those referenced above, to complete her examination and assess the PTSD that he  
27 allegedly suffered because of the events on March 28, 2019.” ECF 183, p. 6.  
28

1 In their Sur-Reply, Plaintiffs claim that in the quoted language above, Frontier was “dishing up blatant  
2 mischaracterizations of deposition testimony and an interrogatory answer.” ECF 186, p. 4.

3 As Frontier explained in its Motion for Leave to Respond to Plaintiffs’ Sur-Reply, during his  
4 deposition, Peter DelVecchia described a prior incident involving a different airline as follows:  
5

6 “I probably should say right now, A.D. is an incredibly affectionate person, and he was  
7 probably ten at the time, and he put his head on my shoulder, and he fell asleep, and I fell  
8 asleep as well. And I was informed, when I got off the plane, by the FBI, that a passenger  
9 reported it to an airline attendant, who then asked the police to question us once we landed.”  
ECF 187, p. 3.

10 As Frontier explained in its Motion for Leave to Respond to Plaintiffs’ Sur-Reply, during his  
11 deposition, Peter DelVecchia also testified about an incident during which he and A.D. were asked to step  
12 outside during the film “Black Panther.” Peter said A.D. was “very upset” about missing a particular scene  
13 from the movie. Peter said once they were outside of the theatre, the police explained the concerns reported  
14 by other movie patrons:

15 “[The police] said that I was holding his hand, and that my hand was resting against his  
16 leg, and that somebody called them and said that they were concerned about abuse of a  
17 minor. And he didn’t say sexual abuse, but he said abuse of a minor. And then they talked  
to A.D. apart from me.” ECF 187, pp. 3-4.

18 Plaintiffs are wrong to accuse Frontier of mischaracterizing Peter DelVecchia’s deposition  
19 testimony. Frontier submits that the prior episodes were accurately described by Frontier’s counsel as  
20 “other occasions when [Peter and A.D.] were questioned under similar circumstances by authorities based  
21 on concerns of inappropriate physical contact.” See ECF 183, p. 6.  
22

### 23 **III. A Thorough Rule 35 Exam Cannot be limited Solely to the Events of March 28, 2018**

24 Plaintiffs argue that Frontier is attempting to conduct a “fishing expedition into all aspects of A.D.s  
25 mind and his life experiences when the only condition in controversy is the PTSD that Plaintiffs have  
26 alleged resulted from the events of March 28, 2019.” ECF 186, p. 4. Plaintiffs claim the prior incidents  
27  
28

1 with the other airline and in the theatre had nothing to do with concerns of inappropriate conduct and  
2 everything to do with racism. According to Plaintiffs, those events did not involve “similar circumstances”  
3 to those alleged in this case, “because in both of those prior events, the police politely allowed them to  
4 return to their activities immediately after learning that they are father and son.” ECF 184, p. 8.

5  
6 Regarding the prior airline incident, the reasonable inference can be drawn that Peter’s testimony  
7 about A.D.’s tendency to be “incredible affectionate” was at least a contributing factor to the passenger  
8 report and resulting police involvement. Moreover, the prior airline incident and current dispute both  
9 involve fact patterns where a witness reported concerns while Peter and A.D. were both asleep. See  
10 Plaintiffs’ Third Amended Complaint at ECF 153, p. 3.

11  
12 Regarding the prior theatre incident, Peter unambiguously testified that police were called over  
13 concerns about “abuse of a minor.” Peter’s testimony also suggests the incident may have significantly  
14 impacted A.D., who was “very upset” about having to leave during an important scene in the movie.  
15 Frontier thus submits that the prior episodes described by Peter are relevant to this case for numerous  
16 reasons, and a thorough Rule 35 exam must necessarily include an assessment of whether the prior  
17 episodes played a role in A.D.’s alleged PTSD diagnosis.

18  
19 It is also noteworthy that Plaintiffs have gone to great lengths to paint a vivid picture of the  
20 enduring harms they have suffered at the hands of racist individuals who are resentful toward bi-racial  
21 families comprised of White parents and Black children. For example, Peter DelVecchia offered the  
22 following Answer to an Interrogatory:

23  
24 20. Identify all instances, from 2014 to the present, where your relationship with A.D. has  
25 been misperceived, including, but not limited to the date, location, whether law  
26 enforcement was called, and name of person misperceiving your relationship, if known.  
27 Also identify whether you were accused of human trafficking or sexual abuse in each such  
28 instance.

1       **ANSWER: On the plane as noted above. I do not have dates on other incidents but**  
 2       **they are as follows:**

3               • **In a movie theater in Wilmington NC a black couple next to us (only people**  
 4               **around) called the police because AD had his hand on my hand – he was 11. A**  
               **few minutes of questions resolved it.**

5               • **People in moving cars have shouted racist comment at us when bike riding,**  
 6               **walking or playing at the park, since he has been 6 years old. Garbage has**  
 7               **been thrown at us as well. I do not recall time and place. These were done by**  
 8               **black people who made comments that a black child should not be in a white**  
               **family and sometimes that I bought a slave.**

9               • **We have been approached in grocery stores by people making comments that**  
 10              **I took him as a slave.**

11              Notably, Plaintiffs argue the only condition in controversy is A.D.’s alleged PTSD, but they also  
 12              assert A.D. suffers from fear, terrifying nightmares, nausea, vomiting, anxiety, embarrassment,  
 13              humiliation, and “other emotional distress.” ECF 186, p. 3. Yet, according to Plaintiffs, A.D.’s symptoms  
 14              were caused exclusively by the Frontier incident, and they have nothing to do with being questioned by  
 15              police after a different flight, being removed from a theatre for questioning by police, having garbage  
 16              thrown at him, being called a slave, and being victimized in public since the age of 6 by complete strangers  
 17              shouting racist insults.

18              Plaintiffs’ desire to narrow the scope of A.D.’s Rule 35 exam to the events that took place on the  
 19              day in question is untenable. The prior episodes described by Peter are highly relevant to this case for  
 20              numerous reasons, and a thorough Rule 35 exam must necessarily include an assessment of whether the  
 21              prior episodes played a role in A.D.’s alleged PTSD diagnosis.

#### 22              **IV. Plaintiffs’ Arguments as to Testing are Improper**

23              Plaintiffs had their chance to challenge Frontier’s proposed tests in their Response brief opposing  
 24              Frontier’s Rule 35 motion. In doing so, Plaintiffs noted Frontier’s proposed “BASC” test is “apparently  
 25              the Behavior Assessment System for Children.” ECF 182 at p. 4. Plaintiffs further argued that Dr.  
 26              the Behavior Assessment System for Children.” ECF 182 at p. 4. Plaintiffs further argued that Dr.  
 27              the Behavior Assessment System for Children.” ECF 182 at p. 4. Plaintiffs further argued that Dr.  
 28              the Behavior Assessment System for Children.” ECF 182 at p. 4. Plaintiffs further argued that Dr.

Stephanie Holland should not be allowed to administer the BASC test, because “Plaintiffs have not placed A.D.’s behavior in controversy...” *Id.* However, in their Sur-Reply, Plaintiffs acknowledge that in December 2019, their own psychologist already performed the “**BASC-3 (Behavior Assessment System for Children, 3d edition).**” (Emphasis added) ECF 186, pp. 4-5.

Plaintiffs also argued in their Response brief that A.D. should not be subjected to a standard intelligence screening for children because they have “not placed A.D.’s IQ in controversy.” ECF 182, p. 4. However, Plaintiffs reveal in their Sur-Reply that their own psychologist administered a “**Sentence Completion Test.**” (Emphasis added) ECF 186, pp. 4-5.

In other words, Plaintiffs argued during the first round of briefing that A.D.’s behavior and intelligence are not conditions in controversy, but then revealed in their Sur-Reply that their own psychologist has already administered tests for behavior and sentence completion. At the same time, Plaintiffs accuse Frontier of being underhanded in its attempts to strike a compromise on the Rule 35 protocol. Again, Frontier will resist the urge to express its frustration with Plaintiffs’ actions. Frontier asserts only that Plaintiffs have made no showing of any danger or actual harm that would result from A.D.’s testing and leveling the playing field for a Rule 35 exam requires allowing Dr. Holland to administer the exam in the manner she sees fit.

## **V. Breaks**

It was Plaintiffs who raised the issue of breaks, asking the Court to order that Plaintiff Peter DelVecchia be allowed to support A.D. during breaks from the examination. *Id.* at 6. Frontier responded to Plaintiffs’ request by stating its agreement that Peter could support A.D. during breaks, but with the caveat that Dr. Holland must be present due to the risk of Peter influencing A.D. ECF 183, p. 6. Frontier also acquiesced to Plaintiffs’ demands that Dr. Holland would not interview Peter, either alone or with A.D. (Compare protocols at ECF 180-3 and ECF 183, p. 4).



In withdrawing its request for Dr. Holland to interview Peter and agreeing to allow Peter to support A.D. during breaks, but also requesting that Dr. Holland be present at all times, Frontier hoped to steer this dispute toward an amicable middle ground. The manner in which A.D. interacts with Peter is at the center of this case. A.D. is now 15 years old, and Plaintiffs have raised no valid concerns about Dr. Holland's credentials or professionalism. Respectfully, Dr. Holland should be trusted and permitted to conduct the exam in the manner she sees fit, even if that means she is present during breaks while A.D. interacts with Peter.

### Conclusion

For the reasons stated, Frontier respectfully submits that the Court should GRANT Frontier's Motion for Rule 35 Mental Examination, and for any other relief this Court deems just and proper.

DATED this 25<sup>th</sup> day of July, 2022

Respectfully submitted,

/s/ Brian T. Maye

Lawrence S. Gosewisch (admitted *pro hac vice*)

Brian T. Maye (admitted *pro hac vice*)

Matthew D. Martin (admitted *pro hac vice*)

ADLER MURPHY & McQUILLEN LLP

20 South Clark Street, Suite 2500

Chicago, Illinois 60603

Phone: (312) 345-0700

Email: [lgosewisch@amm-law.com](mailto:lgosewisch@amm-law.com)

[bmaye@amm-law.com](mailto:bmaye@amm-law.com)

[mmartin@amm-law.com](mailto:mmartin@amm-law.com)

Charles A. Michalek (Nevada Bar No. 5721)

ROGERS, MASTRANGELO, CARVALHO &

MITCHELL

700 South Third Street

Las Vegas, Nevada 89101

Phone: (702) 383-3400

Email: [cmichalek@rmcmlaw.com](mailto:cmichalek@rmcmlaw.com)

*Attorneys for Defendants Frontier Airlines, Inc.,  
Scott Warren & Rex Shupe*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 25, 2022, I caused the foregoing to be electronically filed with the United States District Court for the District of Nevada using the CM/ECF system.

John D. McKay  
PARK AVENUE LAW LLC  
201 Spear Street, Suite 1100  
San Francisco, CA 94105  
Phone: (800) 391-3654  
Email: [johndmckayatty@gmail.com](mailto:johndmckayatty@gmail.com)

Timothy R. Titolo  
TITOLO LAW OFFICE  
9950 West Cheyenne Avenue  
Las Vegas, Nevada 89129  
Phone: (702) 869-5100  
Email: [tim@titololaw.com](mailto:tim@titololaw.com)

*Attorneys for Plaintiffs*

By: /s/ Brian T. Maye